No. 93-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, *et al.*,
Petitioners

v.

NATIONAL TREASURY EMPLOYEES UNION, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION, ET AL., IN OPPOSITION

MARK D. ROTH
General Counsel

ANNE WAGNER
Assistant General Counsel

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6425

JOHN VANDERSTAR
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-5540

STEPHEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
132 W. 43rd Street
New York, N.Y. 10016

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION
1400 20th Street, N.W.
Washington, D.C. 20036

GREGORY O'DUDEN
General Counsel
Counsel of Record

ELAINE KAPLAN
Deputy General Counsel

BARBARA A. ATKIN
Associate General Counsel
for Appellate Litigation

NATIONAL TREASURY EMPLOYEES UNION
901 E Street, N.W., Suite 600
Washington, D.C. 20004
(202) 783-4444

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

The Ethics Reform Act of 1989, as amended, 5 U.S.C. App. 501, *et seq.* (Supp. IV 1992), prohibits the receipt of "any thing of value" for any appearance, speech or article by Members of Congress and by officers and employees of the federal government. The questions presented are:

1. Whether the court of appeals correctly applied the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), in holding that a ban on receipt of compensation for expressive activities unrelated to official duties unconstitutionally restricts the First Amendment rights of executive branch employees because it is broader than reasonably necessary to serve a substantial governmental interest.

2. Whether the court of appeals correctly invalidated Section 501(b) as applied to executive branch employees, leaving it to Congress to narrow the ban, rather than attempting to render the statute constitutionally sound by fashioning a nexus standard of its own.

PARTIES TO THE PROCEEDING

National Treasury Employees Union Chapter 143 is a party to this proceeding, in addition to those listed by the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1170

UNITED STATES OF AMERICA, *et al.*,
Petitioners
v.
NATIONAL TREASURY EMPLOYEES UNION, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION, ET AL., IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 990 F.2d 1271. The opinions filed on the denial of rehearing en banc (Pet. App. 80a-107a) are reported at 3 F.3d 1555. The opinion of the district court (Pet. App. 59a-78a) is reported at 788 F. Supp. 4. The opinion of the court of appeals affirming the denial of a preliminary injunction is reported at 927 F.2d 1253.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1993. The petition for rehearing was denied on September 21, 1993. The petition for certiorari was timely filed on January 19, 1994, pursuant to an extension of time granted by the Chief Justice on December

10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTION, STATUTE, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech." The relevant portion of the Ethics Reform Act of 1989, as amended, 5 U.S.C. app. 501 *et seq.* (Supp. IV 1992), is set forth at Pet. App. 108a-113a. The relevant regulations implementing that Act are set forth at Pet. App. 114a-134a. Other regulations establishing standards of conduct applicable to executive branch employees' outside activities, 5 C.F.R. 2635.801 *et seq.* (1993 ed.), are set forth in the appendix to this opposition, App. 1a-24a.

STATEMENT

1. For many years, members of the career civil service have been subject to an array of government-wide restrictions, often supplemented by individual agency restrictions, designed to prohibit participation in any outside activities that could create a conflict of interest or the appearance of a conflict. *See, e.g.*, 5 C.F.R. 735.201 *et seq.* (1990 ed.); C.A. Joint Appendix 130-135, 110-117. Among other things, they were prohibited from engaging in any activity "not compatible with the full and proper discharge" of their governmental duties, from accepting compensation that might create the appearance of a conflict, and from using government equipment or nonpublic information in the course of their activities. *See* 5 C.F.R. 735.203-735.206 (1990 ed.).

Such restrictions were designed to give civil servants freedom to engage in outside personal and professional activities, including those for remuneration, so long as there was no real or perceived conflict with their public responsibilities. Recognizing that some outside activities

—particularly teaching, lecturing and writing—could enhance the employee's professional standing and his or her value to the agency, the regulations affirmatively encouraged participation in those activities. *Id.* at 735.203(c); C.A. Joint Appendix 104-5, 116.

On November 30, 1989, Congress passed the Ethics Reform Act of 1989 (Pub. L. No. 101-194, 103 Stat. 1716) amending the Ethics in Government Act of 1978. The relevant provisions, which took effect January 1, 1991, provided that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. app. 501(b). Section 505, as originally enacted, defined "honorarium" as "a payment of money or any thing of value for an appearance, speech or article . . . by a Member, officer or employee, excluding any actual and necessary travel expenses. . . ." 5 U.S.C. app. 505(3) (Supp. I 1989).

The prohibition on acceptance of "honoraria" was originally applicable to all officers and employees of the executive and judicial branches, including employees at the very lowest grades, and to members of the House of Representatives and their staff, but not to Senators and their staff. 5 U.S.C. app. 505(1), (2). The prohibitions relating to honoraria and limitations on outside income were coupled with a 25-percent pay increase for members of the House, the judiciary, and senior executive branch officials. Pub. L. No. 101-194, Title VII, Sec. 703, 5 U.S.C. 5318 note. Lower graded executive branch employees did not receive this generous pay increase.

Senators and their staff, who were not initially covered by the honoraria ban, did not receive a 25-percent pay increase at that time. Pub. L. No. 101-194, Title XI, Sec. 1101, 5 U.S.C. 5305 note. In the Congressional Operations Appropriations Act of 1991, Congress extended both the ban on receipt of honoraria and the accompanying pay increase to Senators and their staff. Pub.

L. No. 102-90, Tit. I, § 6(b)(2), 105 Stat. 450, 5 U.S.C. 5318 note.

The 1991 Appropriations Act also amended Section 505 of the Ethics Reform Act to deal specifically with series of appearances, speeches, or articles. *Id.* at Tit. III, § 314(b), 105 Stat. 469. Effective January 1, 1992, the definition of "honorarium" read as follows:

> The term "honorarium" means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual * * *.

5 U.S.C. app. 505(3) (Supp. IV 1992).[1]

2. Shortly before the effective date of Section 501(b), two federal employee unions and several individual career executive branch employees commenced actions in the United States District Court for the District of Columbia challenging the constitutionality of the ban on receipt of compensation for expressive activity and seeking injunctive relief.[2] The National Treasury Employees Union was certified as the class representative of all executive branch employees below the grade of GS-16 who would receive "honoraria" but for the prohibitions of Section 501(b). Pet. App. 3a.

---

[1] Pursuant to authority granted it by 5 U.S.C. app. 503 to issue rules and regulations with respect to officers and employees of the executive branch, the Office of Government Ethics has promulgated extensive regulations interpreting this statutory language. 5 C.F.R. 2636.201 *et seq.* (1993 ed.), set forth at Pet. App. 114a-134a.

[2] NTEU later amended its complaint to include as a plaintiff its local chapter 143, which was adversely affected by the ban on receipt of honoraria because the federal employee who had written its newsletter refused to continue doing so without compensation.

The undisputed factual record established that individual plaintiffs were full-time career executive branch employees who had written or spoken for valuable consideration prior to the effective date of the Act. Pet. App. 60a-61a. On their own time and using their own resources, they had addressed a variety of subjects unrelated to their official duties. *Id.* at 60a-61a & n.1. The individual plaintiffs included, among others, a Nuclear Regulatory Commission attorney who was working on articles on Russian history, a mailhandler who wrote and spoke about the Quaker religion, a Department of Labor attorney who delivered lectures on Judaism, and an employee of the Department of Health and Human Services who free-lanced as a theater critic for local newspapers. Pet. App. 9a-10a.

Following the enactment of the ban, the plaintiffs' practical ability and incentive to engage in these expressive activities were significantly affected. The plaintiffs were forced to curtail, and in some cases to cease, their writing and speaking activity. C.A. Joint Appendix 61, 103-04, 189, 191-92, 228, 243.

3. The district court granted summary judgment in favor of the plaintiffs. Pet. App. 78a. Applying the teachings of *Simon & Schuster, Inc. v. New York State Crime Victims' Board*, —— U.S. ——, 112 S. Ct. 501 (1992), the court held that the prohibition at issue directly burdened plaintiffs' First Amendment right of free speech by acting as a financial disincentive to constitutionally protected expressive activity. Pet. App. 63a-64a.

The court concluded that the "honoraria" ban was unconstitutionally over-inclusive because—although ostensibly intended to eliminate the possibility of official corruption—it proscribed compensation "even when there is neither the possibility nor a perception that the office and the payment are interdependent." Pet. App. 70a. The ban was also underinclusive, the district court determined, because it singled out "appearances, speeches, and

articles," while permitting payment for a "myriad" of other forms of expression "on the same subject, from the same supplicant in quest of the same government favor." Pet. App. 70a. *See also id.* at 73a.

As relief, the court struck down the honoraria ban as applied to executive branch employees, while leaving it intact as applied to the legislative and judicial branches. Pet. App. 78a. Finding that the focus of congressional concern was the correction of perceived abuses in receipt of honoraria by Members of Congress themselves, the court concluded that Congress would have enacted the provision even without the extension of the ban to all federal employees. *Id.* at 73a-78a.

4. The court of appeals affirmed in a 2-1 decision. Pet. App. 1a-8a. Applying the test articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the court concluded that Section 501(b) violates the First Amendment right of federal employees to speak on matters of public concern because it restricts substantially more speech than necessary to serve the governmental interest in avoiding impropriety or the appearance of impropriety. Pet. App. 3a-14a.

The court observed that "there would have to be some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor" in order to create "the sort of impropriety or appearance of impropriety at which the statute is evidently aimed." Pet. App. 9a. The ban in Section 501(b) however, reached much activity with "no nexus to government work that could give rise to the slightest concern." *Id.* at 10a.

The "excess sweep" of the ban, the court observed, could not be justified as a "prophylactic" measure. Pet. App. 11a-14a. As the court pointed out, there was no showing of improprieties that would be remedied by the ban "but not by prior regulations" or of "any serious enforcement or line-drawing costs associated with those regulations." *Id.* at 11a. Further, the court found, there was no suggestion of any actual public perception of a risk of corruption in the receipt of compensation by low-level government employees for speech unrelated to their duties to audiences that are equally unrelated. *Id.* at 13a.

Addressing the proper remedy, the court applied the settled principle that it should "refrain from invalidating more of the statute than is necessary." Pet. App. 14a (citation omitted). The court therefore left Section 501(b) intact as applied to the legislative and judicial branches and invalidated it as applied to the executive branch. *Id.* at 14a-18a.

The court declined to modify Section 501(b) so as to preserve a ban on compensation when there was an "appropriate nexus" between the employee's job and the appearance, speech, or article; it declared the articulation of such a test to be "a purely legislative act." Pet. App. 14a. Finding no "construction that would trim off all or even most of the invalid applications to executive branch employees," the court held the section unconstitutional as applied to that branch. *Id.*

Judge Sentelle, in dissent, argued that the majority had erred in treating this case as a facial challenge to Section 501(b), rather than as a challenge to the ban as applied to plaintiffs. Pet. App. at 20a-30a. He also contended that the ban was sufficiently "narrowly tailored," even without a job nexus, given the government interest in avoiding the appearance of impropriety and administrative difficulties. *Id.* at 30a-52a.[3]

5. The United States sought rehearing and suggested rehearing en banc. The court of appeals denied the petition for rehearing and, over the dissents of Judges Sentelle

[3] Judge Sentelle also took issue with the majority's mode of severance (*id.* at 52a-57a), arguing that its conclusions regarding the ban's facial invalidity should have led it to strike down the ban as to all "officers and employees," leaving it in place only with respect to Members of Congress. Pet. App. 57a.

and Silberman, rejected the suggestion for rehearing en banc. Pet. App. 79a-81a.

ARGUMENT

The decision of the court of appeals does not present an issue of sufficient legal or practical importance to warrant review by this Court. In ruling the "honoraria" ban unconstitutional because it is broader than reasonably necessary to serve a substantial government interest, the court of appeals relied on well-settled principles, advanced by the government, that are applicable to laws burdening the exercise of First Amendment rights in the public employment context. The decision simply represents the judgment of a majority of the court, agreeing with the district court, that the operation of this particular statute does not "fit" with the congressional concerns that motivated its enactment and therefore is an undue burden on speech. That decision does not conflict with any decision of this Court or any court of appeals; moreover, it will have virtually no impact on the federal employee standards of conduct. Accordingly, this Court should decline further review.

1. While the decision of the court of appeals is important to the individuals affected, its reach is far less broad, and its practical import for the federal government in general is far less significant, than urged by the government. *See* Pet. 6.

a. First, the impact of the lower court decision is limited, by its terms, to *executive branch* employees. Members of Congress and officers and employees of the legislative and judicial branches are still barred from accepting honoraria. Moreover, even within the executive branch, the practical effect of the decision is limited by other restrictions imposed by executive order. Certain senior "noncareer" executive branch employees remain forbidden to accept *any* "outside earned income," regard-

less of its source. *See* Pet. App. 17a.[4] Other noncareer employees, such as noncareer Senior Executive Service employees and senior Schedule C employees, are subject to a 15 percent limitation on outside earned income. 5 C.F.R. 2636.303, 304.[5]

Thus, the only individuals now free to accept compensation for their writing and speaking without express monetary limitations are career executive branch employees and lower graded noncareer employees. Even as to these individuals, the court of appeals' decision leaves in place a comprehensive system of statutes and regulations designed to prohibit any conduct that could give rise to impropriety or the appearance of impropriety.

Under those regulations, *any* activity by an executive branch employee, including any writing, speaking, or appearance, that "conflicts with an employee's official duties" is prohibited. 5 C.F.R. 2635.802. App. 4a-5a. Federal statutes, further, prohibit receipt of compensation for government service or supplementation of salary from a private party (18 U.S.C. 209 (1988 & Supp. IV 1992)), as well as solicitation or receipt of bribes (18 U.S.C. 201(b) and (c)). In short, the only practical effect of the decision below is to relieve employees of the honoraria ban's *additional* prohibition against receipt of compensa-

---

[4] Under Executive Order 12674 (April 12, 1989), 3 C.F.R. 215 (1990), a "covered noncareer employee"—namely, one who is paid at the rate of GS-16 or higher—who is a presidential appointee (with certain exceptions set forth in 5 C.F.R. 2636.303(a)(1)) is prohibited from receiving "any outside earned income for outside employment or any other activity performed during that Presidential appointment." *See* 5 C.F.R. 2636.302(a); 5 C.F.R. 2635.804.

[5] The Senior Executive Service includes both career and noncareer supervisors and managers in positions whose rate of pay exceeds that of GS-15. *See* 5 C.F.R. 214.201 *et seq.* (1993 ed.). Schedule C employees are appointed to positions of a confidential or policy-determining character and are excepted from the competitive service. *See* 5 C.F.R. 213.3301 *et seq.* (1993 ed.).

tion for activity that *does not* create a conflict of interest or the appearance of a conflict with their official duties.[6]

b. Further, the court of appeals' decision will have virtually no impact on the overriding congressional purpose in enacting the honoraria ban because executive branch employees—and particularly career employees—were never the focus of congressional concern. There is no evidence of a perception by *any* Member of Congress that the receipt of outside income by career government employees had been abused. On the contrary, as the district court and the court of appeals both noted, the legislative history clearly indicates that "Congress was principally concerned that the receipt of honoraria by Members of Congress created the appearance of influence-buying." Pet. App. 15a. *See also id.* at 16a, 75a-77a.[7]

In urging that the court of appeals decision will interfere significantly with policies Congress has deemed important, the government relies exclusively and unpersuasively on the reports of two Commissions. One of those,

[6] Recognizing that the court's decision leaves a comprehensive system of regulatory and statutory prohibitions in place, the government nonetheless suggests that the system might somehow be inadequate because one remedy for violations of Section 501(b)—the recapture of unlawfully received compensation—"is not necessarily available under other provisions." Pet. 12 n.10. Even assuming that "recapture" is not available, however, that remedy pales in significance when compared to such existing remedies as criminal sanctions and disciplinary action, up to and including discharge. Given existing rules, defendant Stephen D. Potts, Director of the Office of Government Ethics and the official charged with administering the Act, has stated that, in his opinion, the ban is "not necessary to protect the integrity of he government." C.A. Joint Appendix 127-29.

[7] Virtually all legislative references are to Members of Congress themselves. While there are a few references to senior executive branch officials and the judiciary (*see, e.g.*, 135 Cong. Rec. H8746, H8747 (daily ed. Nov. 16, 1989) (statement of Rep. Fazio); S15987 (daily ed. Nov. 17, 1989) (statement of Sen. Mitchell)), there is no discussion of abuses by such officials.

the Report of the 1989 Quadrennial Commission on Executive, Legislative, and Judicial Salaries, merely recommended, without any discussion or supporting findings, "that the practice of accepting honoraria in all three branches be terminated by statute." C.A. Joint Appendix 39. There is no indication that, in so recommending, the Commission ever contemplated a prohibition on career employees' acceptance of compensation for expressive activity unrelated to their duties.

Importantly, that Commission's definition of "honoraria" did not include payment for written work. Nor did its definition seem to encompass the receipt of payment from persons or groups not involved in the legisaltive process. Rather, it defined "honoraria" as "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group, often one with a material interest in pending or anticipated legislation." *Id.*

The other report, prepared by the Wilkey Commission, borrowed the Quadrennial Commission's definition of "honoraria" and echoed its recommendation based on a concern for "uniformity" and "equitable limitations across the government."[8] C.A. Joint Appendix 139-140. Both the definition of "honoraria" and the cursory treatment of the issue underscore that, as both the district court and court of appeals recognized, the true focus of the reform effort was on the elimination of congressional acceptance of payments from constituent groups. The measure designed to address the concern—the ban on congressional acceptance of honoraria—remains unaffected by the court of appeals' decision.[9]

[8] The Court should hesitate to assign weight to the Wilkey Commisison's recommendations in any event, for Congress evidently discounted its goal of uniformity: as discussed *supra*, the initial statutory provision did not include Senators and their staff within the scope of the ban.

[9] Congressional disinterest in the application of the honoraria ban to executive branch employees is evident in the virtually

2. Moreover, the court of appeals' decision does not warrant review because its rationale and result are fully consistent with settled principles applied by this Court in assessing the constitutionality of restrictions on government employee speech.

a. The court of appeals applied the balancing test set forth in *Pickering v. Board of Education, supra*, under which "the interests of the [employee], as a citizen, in commenting upon matters of public concern" are balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Under the test, the governmental interest must be a "substantial" one, "unrelated to the suppression of free expression." *Brown v. Glines*, 444 U.S. 348, 354 (1980). Further, the government may "restrict speech no more than is reasonably necessary" to protect that substantial interest. *Id.* at 355. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (government regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests").

The court of appeals concluded that the ban on compensation for any article-writing or speaking restricted more speech than was reasonably necessary to further the governmental interest in guarding against the appearance of impropriety. In essence, the court found that a ban imposed even in the absence of a nexus between the employee's job and either the subject matter of the expression or the identity of the payor did not reasonably "fit" the end it purportedy served. That conclusion is well founded

---

unanimous congressional support for measures to amend the statute to eliminate a flat government-wide ban. *See* discussion of congressional action at Pet. App. 90a-92a (Silberman, J., dissenting from the denial of rehearing *en banc*) (noting unanimous Senate support for an amendment); *id.* at 78a n.15 (Jackson, J.) (noting House passage of an amendment, which was not considered by the Senate because of the objections of a single senator).

on record evidence demonstrating the ban's impact and on the court's analysis of the expressions of legislative intent underlying the law. *See supra* at 8-10.

b. In its petition, the government takes issue, not with the test the court of appeals used, but with the result it reached. At its core, the government's argument is simply an assertion that the court should have struck the balance in favor of the governmental interest. Resolution of that disagreement, of course, does not warrant this Court's consideration; moreover, the government's various critiques of the court of appeals' conclusions lack merit.

The court of appeals properly rejected the notion, advanced here by the government, that the ban was reasonable in scope because Congress "could have" been concerned about the appearance if impropriety, even absent a nexus. *See* Pet. 8. Not only are there no "prior examples of abuse" that might raise the concern suggested by the government (*see id.* at 8 n.6) but, as the court of appeals recognized (Pet. App. 13a), there is no logical reason to infer it likely "that the public actually perceives a risk of corruption in receipt by low-level government employees of remuneration on topics that are wholly unrelated to their function, to audiences that are equally unrelated." [10]

---

[10] The court of appeals correctly observed that less evidence is necessary when "the evil to be averted" would ordinarily be concealed. Pet. App. 13a. Such is not the case here. There is no reason to think that it would be unusually difficult to demonstrate a public perception of impropriety in receipt of payment by low-level government employees for these kinds of expressive activities, if that perception existed. Certainly, Congress had before it much evidence that receipt of honoraria by members of its own body created a perception of impropriety. The source of concern posited by the government is, therefore, very different from the evils regulated by the Hatch Act. *Cf.* Pet. 8, n.6, citing *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). One of the goals of the Hatch Act was to prevent supervisors from pressuring lower level employees to vote in a certain way or perform political chores to curry favor. In that context, the court of appeals recognized,

The government's additional argument—that the "excessive sweep" of the ban may be justified as a reasonable "prophylactic" measure—is equally unavailing, given the utter lack of any legislative findings or evidence before Congress of the need for such a prophylactic. As this Court has recently recognized, a restriction on speech—which, of course, brings the First Amendment into play—must be supported by more than a mere "hypothetical possibility" of abuse, even when it could be characterized as a "prophylactic measure."[11] *See FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 498 (1985); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978). Indeed, because "[b]road prophylactic rules in the area of free expression are suspect" (*NAACP v. Button*, 371 U.S. 415, 438 (1962) (citations omitted)), courts must scrutinize with unusual care the legislative findings or record evidence supporting congressional action. *Sable Communications of California v. FCC*, 492 U.S. 115, 129 (1989). It was by reviewing the findings and evidence in light of those settled principles that both lower courts reached their decision that the statute is too broad.

"[t]he potential for such subtle pressures is not only pervasive but inherently difficult to demonstrate or assess; thus, the absence of episodes coming to light is quite consistent with the Congressional concern." Pet. App. 13a.

[11] Even the government's characterization of Section 501(b) as a prophylactic measure is suspect. While it terms the measure a "complete and impermeable ban" (Pet. 9) and "a uniform and complete ban" (*id.* at 6), the ban is, in fact, decidedly permeable. Initially, of course, the ban did not even cover Senators and their staffs, despite widespread concern over the appearance of impropriety in their acceptance of honoraria. The statute, in addition, prohibited the acceptance of honoraria only for "an appearance, speech, or article," thereby permitting payment for what the district court termed the "myriad other forms of expression" on the same subject from the same audience (Pet. App. 70a). The regulations issued by OGE have added countless exceptions, which have simply underscored the arbitrary nature of the ban's coverage. *See* Pet. App. 70a-71a, 73a.

The government's effort to manufacture a conflict between the court of appeals' application of these principles to the facts of this case, and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), is unpersuasive. In *Mitchell*, the Court upheld the Hatch Act prohibitions in the context of a *demonstrated* "menace" of public employee involvement in partisan politics. 330 U.S. at 103. The executive branch had regulated such involvement for decades before Congress enacted legislation. That regulation, moreover, was approved in some form by both the courts and "a large body of informed public opinion." *Id.*

Similarly, when this Court returned to the issue in *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973), it underscored the "judgment of history," which showed that vital government interests were clearly at risk when public employees became involved in partisan politics. The Court further cited the abundant record evidence demonstrating a clear need to protect government workers from supervisory coercion; to ensure merit-based employment decisions; and to guard against real and apparent abuses in enforcement of the law. *Id.* at 564-566.

A documented recoord of abuse and decades of regulation in the Hatch Act cases formed the basis for clearly articulated congressional concerns. Here, in marked contrast, there is no history of specific abuses and the legislative record is virtually silent on any subject other than reecipt of honoraria by Members of Congress. The court of appeals' analysis and conclusions are thus fully consistent with this Court's Hatch Act precedents and do not warrant further review by this Court.

3. The court of appeals' decision to invalidate section 501(b) with respect to those as to whom a constitutional defect had been shown—namely, executive branch employees—was also correct and does not merit further review. Because the ban was not adequately tailored with respect to employees in the executive branch, it fell "short

of constitutional demands" "on its face and therefore in all of its applications" within that branch. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n.13 (1984).

The government cites no authority that required the court of appeals to write into the statute language identifying and defining the circumstances in which there would exist an adequate "nexus between the subject matter of the expression or the character of the payor." Pet. 10-11, quoting Pet. App. 9a.[12] In fact, such an action would have contravened the time-honored rule that courts are not to "introduce words of limitation in order to uphold the valid applications" of a challenged statute. 2 N. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 44.16, at 529 (4th ed. 1986) (citing cases). As this Court explained more than 100 years ago, it cannot sustain the constitutionality of a statute by inserting words "that are not now there," for to do so "would be to make a new law, not to enforce an old one." *United States v. Reese*, 92 U.S. 214, 221 (1875).[13]

---

[12] Significantly, the government waited until its petition for rehearing to suggest that the court of appeals should have crafted its own nexus test. Although the district court had, like the court of appeals, invalidated the ban as applied to the executive branch, the government did not object to the order on that basis in its opening brief to the court of appeals. Instead, it advanced arguments that it has here abandoned: that the district court had erred in including employees who were not addressing "matters of public concern" and in extending relief beyond the members of the certified class—employees in the executive branch below the grade of GS-16. Government's Brief, filed August 31, 1992, at 27 n.58. It was not until the petition for rehearing that the government argued that the court should have limited its order to the "invalid applications" by articulating a nexus test. Pet. for Reh., filed May 14, 1993, at 10. *Cf. City of Canton, Ohio v. Harris*, 489 U.S. 378, 383-85 (1989) (suggesting certiorari might have been denied had Court been notified at the appropriate stage of the proceedings of the inexactness of the various presentations of the issue below).

[13] Even with a severability provision, the Court should not "dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court." *Hill v. Wallace*, 259 U.S. 44, 70 (1922). *Accord, Wyoming v. Oklahoma*, —— U.S. ——, 112 S. Ct. 789, 803-04 (1992) ("clearly not this Court's province to rewrite a state statute").

The need for judicial forbearance is particularly pointed here, where the suggested limitation is the insertion of a "nexus test."[14] The court of appeals below correctly observed that "[a]rticulation of some appropriate nexus test would seem a purely legislative act." Pet. App. 14a.[15]

In short, it is the court's responsibility to strike down an unconstitutional provision, not to determine which of several options should be selected in reframing the provision to meet constitutional concerns. The court of appeals resolved this issue correctly, and further review by this Court is not warranted.

---

[14] Congress has wrestled with the exact bounds of a nexus test; the House and Senate bills contained somewhat different job relatedness tests, together with different definitions of covered employees and prior reporting requirements. *Compare* H.R. 3341, which was passed by the House of Representatives on November 25, 1991, *with* S. 242 and accompanying report, S. Rep. No. 102-29, 102d Cong., 1st Sess. (1991) at 8-14 (both appended to our brief to the court of appeals). The nexus test that the government would have the court of appeals graft onto Section 501(b) is yet a third version.

[15] The government incorrectly reasons that "'[i]f the nexus concept serves to identify the *unconstitutional* applications of Section 501(b), . . . it can also serve to identify the *constitutional* applications of Section 501(b)." Pet. 11 (emphasis in original). This argument ignores the wide variety of routes available to Congress in redrafting Section 501(b) to satisfy constitutional concerns. The lower court merely found no impropriety or appearance of impropriety in the absence of "some sort" of a nexus. Pet. App. 9a. The court further left open the possibility that Congress could enact a broad prophylactic rule barring "honoraria" even in the absence of a nexus, if it were to make the requisite findings concerning the possibility of abuse to support that action. *Id.* at 12a-14a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GREGORY O'DUDEN
General Counsel
Counsel of Record

ELAINE KAPLAN
Deputy General Counsel

BARBARA A. ATKIN
Associate General Counsel
for Appellate Litigation

NATIONAL TREASURY EMPLOYEES UNION
901 E Street, N.W., Suite 600
Washington, D.C. 20004
(202) 783-4444

MARK D. ROTH
General Counsel

ANNE WAGNER
Assistant General Counsel

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6425

JOHN VANDERSTAR
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-5540

STEPHEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
132 W. 43rd Street
New York, N.Y. 10016

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION
1400 20th Street, N.W.
Washington, D.C. 20036

March 1994

APPENDIX

APPENDIX

PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH (Eff. 2-3-93)

Subpart H—Outside Activities

§ 2635.801 Overview.

(a) This subpart contains provisions relating to outside employment, outside activities and personal financial obligations of employees that are in addition to the principles and standards set forth in other subparts of this part. Several of these provisions apply to uncompensated as well as to compensated outside activities.

(b) An employee who wishes to engage in outside employment or other outside activities must comply with all relevant provisions of this subpart, including, when applicable:

(1) The prohibition on outside employment or any other outside activity that conflicts with the employee's official duties;

(2) Any agency-specific requirement for prior approval of outside employment or activiites;

(3) The limitations on receipt of outside earned income by certain Presidential appointees and other noncareer employees;

(4) The limitations on paid and unpaid service as an expert witness;

(5) The limitations on participation in professional organizations;

(6)The limitations on paid and unpaid teaching, speaking, and writing; and

(7) The limitations on fundraising activities.

(c) Outside employment and other outside activities of an employee must also comply with applicable provisions

set forth in other subparts of this part and in supplemental agency regulations. These include the principle that an employee shall endeavor to avoid actions creating an appearance of violating any of the ethical standards in this part and the prohibition against use of official position for an employee's private gain or for the private gain of any person with whom he has employment or business relations or is otherwise affiliated in a nongovernmental capacity.

(d) In addition to the provisions of this and other subparts of this part, an employee who wishes to engage in outside employment or other outside activities must comply with applicable statutes and regulations. Relevant provisions of law, many of which are listed in subpart I of this part, may include:

(1) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty;

(2) 18 U.S.C. 201(c), which prohibits a public official, otherwise than as provided by law for the proper discharge of official duty, from seeking, accepting, or agreeing to receive or accept anything of value for or because of any official act;

(3) 18 U.S.C. 203(a), which prohibits an employee from seeking, accepting, or agreeing to receive or accept compensation for any representational services, rendered personally or by another, in relation to any particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, or other specified entity. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restriction;

(4) 18 U.S.C. 205, which prohibits an employee, whether or not for compensation, from acting as agent

or attorney for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity, in any particular matter in which the United States is a party or has a direct and substantial interest. It also prohibits receipt of any gratuity, or any share of or interest in a claim against the United States, in consideration for assisting in the prosecution of such claim. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restrictions;

(5) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several exceptions that limit its applicability;

(6) The Emoluments Clause of the United States Constitution, article I, section 9, clause 8, which prohibits anyone holding an office of profit or trust under the United States from accepting any gift, office, title or emolument, including salary or compensation, from any foreign government except as authorized by Congress. In addition, 18 U.S.C. 219 generally prohibits any public official from being or acting as an agent of a foreign principal, including a foreign government, corporation or person, if the employee would be required to register as a foreign agent under 22 U.S.C. 611 *et seq.*;

(7) The Hatch Act, 5 U.S.C. 7321 through 7328, which prohibits most employees from engaging in certain partisan political activities and prohibits all employees from interfering with elections and conducting political activities in the Federal workplace;

(8) The honorarium prohibition, 5 U.S.C. App. (Ethics in Government Act of 1978), which prohibits an employee, other than a special Government employee, from receiving any compensation for an appearance, speech or

article. Implementing regulations are contained in §§ 2636.201 through 2636.205 of this chapter; and

(9) The limitations on outside employment, 5 U.S.C. App. (Ethics in Government Act of 1978), which prohibit a covered noncareer employee's receipt of compensation for specified activities and provide that he shall not allow his name to be used by any firm or other entity which provides professional services involving a fiduciary relationship. Implementing regulations are contained in §§ 2636.305 through 2636.307 of this chapter.

[57 FR 35041, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992]

§ 2635.802 Conflicting outside employment and activities.

An employee shall not engage in outside employment or any other outside activity that conflicts with his official duties. An activity conflicts with an employee's official duties:

(a) If it is prohibited by statute or by an agency supplemental regulation; or

(b) If, under the standards set forth in §§ 2235.402 and 2635.502, it would require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired.

Employees are cautioned that even though an outside activity may not be prohibited under this section, it may violate other principles or standards set forth in this part or require the employee to disqualify himself from participation in certain particular matters under either subpart D or subpart E of this part.

Example 1: An employee of the Environmental Protection Agency has just been promoted. His principal

duty in his new position is to write regulations relating to the disposal of hazardous waste. The employee may not continue to serve as president of a nonprofit environmental organization that routinely submits comments on such regulations. His service as an officer would require his disqualification from duties critical to the performance of his official duties on a basis so frequent as to materially impair his ability to perform the duties of his position.

Example 2: An employee of the Occupational Safety and Health Administration who was and is expected again to be instrumental in formulating new OSHA safety standards applicable to manufacturers that use chemical solvents has been offered a consulting contract to provide advice to an affected company in restructuring its manufacturing operations to comply with the OSHA standards. The employee should not enter into the consulting arrangement even though he is not currently working on OSHA standards affecting this industry and his consulting contract can be expected to be completed before he again works on such standards. Even though the consulting arrangement would not be a conflicting activity within the meaning of § 2635.802, it would create an appearance that the employee had used his official position to obtain the compensated outside business opportunity and it would create the further appearance of using his public office for the private gain of the manufacturer.

§ 2635.803 Prior approval for outside employment and activities.

When required by agency supplemental regulation, an employee shall obtain prior approval before engaging in outside employment or activities. Where it is determined to be necessary or desirable for the purpose of administering its ethics program, an agency shall, by supplemental regulation, require employees or any category of employees to obtain prior approval before engaging in specific types of outside activities, including outside employment.

NOTE: Any requirement for prior approval of employment or activities contained in any agency regulation, instruction, or other issuance in effect prior to the effective date of this part shall constitute a requirement for prior approval for purposes of this section for one year after the effective date of this part or until issuance of an agency supplemental regulation, whichever occurs first.

§ 2635.804 Outside earned income limitations applicable to certain Presidential appointees and other noncareer employees.

(a) *Presidential appointees to fulltime noncareer positions.* A Presidential appointee to a full-time noncareer position shall not receive any outside earned income for outside employment, or for any other outside activity, performed during that Presidential appointment. This limitation does not apply to any outside earned income received for outside employment, or for any other outside activity, carried out in satisfaction of the employee's obligation under a contract entered into prior to April 12, 1989.

(b) *Covered noncareer employees.* Covered noncareer employees, as defined in § 2636.303(a) of this chapter, may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year. Employees should consult the regulations implementing this limitation, which are contained in §§ 2636.301 through 2636.304 of this chapter.

NOTE: In addition to the 15 percent limitation on outside earned income, covered noncareer employees are prohibited from receiving any compensation for: practicing a profession which involves a fiduciary relationship; affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary

relationship; serving as an officer or member of the board of any association, corporation or other entity; or teaching without prior approval. Implementing regulations are contained in §§ 2636.305 through 2636.307 of this chapter.

(c) *Definitions.* For purposes of this section:

(1) *Outside earned income* has the meaning set forth in § 2636.303(b) of this chapter, except that § 2636.303 (b)(8) shall not apply.

(2) *Presidential appointee to a fulltime noncareer position* means any employee who is appointed by the President to a full-time position described in 5 U.S.C. 5312 through 5317 or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position filled under the authority of 3 U.S.C. 105 or 3 U.S.C. 107(a) for which the rate of basic pay is less than that for GS-9, step 1 of the General Schedule;

(ii) A position, within a White House operating unit, that is designated as not normally subject to change as a result of a Presidential transaction;

(iii) A position within the uniformed services; or

(iv) A position in which a member of the foreign service is serving that does not require advice and consent of the Senate.

Example 1: A career Department of Justice employee who is detailed to a policymaking position in the White House Office that is ordinarily filled by a noncareer employee is not a Presidential appointee to a full-time noncareer position.

Example 2: A Department of Energy employee appointed under § 213.3301 of this title to a Schedule C position is appointed by the agency and, thus, is not a Presidential appointee to a full-time noncareer position.

§ 2635.805 Service as an expert witness.

(a) *Restriction.* An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section. Except as provided in paragraph (b) of this section, this restriction shall apply to a special Government employee only if he has participated as an employee or special Government employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

(b) *Additional restriction applicable to certain special Government employees.* (1) In addition to the restriction described in paragraph (a) of this section, a special Government employee described in paragraph (b)(2) of this section shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which his employing agency is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section.

(2) The restriction in paragraph (b)(1) of this section shall apply to a special Government employee who:

(i) Is appointed by the President;

(ii) Serves on a commission established by statute; or

(iii) Has served or is expected to serve for more than 60 days in a period of 365 consecutive days.

(c) *Authorization to serve as an expert witness.* Provided that the employee's testimony will not result in compensation for an appearance in violation of § 2636.201 of this chapter or violate any of the principles or standards set forth in this part, authorization to provide

expert witness service otherwise prohibited by paragraphs (a) and (b) of this section may be given by the designated agency ethics official of the agency in which the employee serves when:

(1) After consultation with the agency representing the Government in the proceeding or, if the Government is not a party, with the Department of Justice and the agency with the most direct and substantial interest in the matter, the designated agency ethics official determines that the employee's service as an expert witness is in the interest of the Government; or

(2) The designated agency ethics official determines that the subject matter of the testimony does not relate to the employee's official duties within the meaning of § 2635.807(a)(2)(i).

(d) Nothing in this section prohibits an employee from serving as a fact witness when subpoenaed by an appropriate authority.

§ 2635.806 Participation in professional associations. [Reserved]

§ 2635.807 Teaching, speaking and writing.

(a) *Compensation for teaching, speaking or writing.* Except as permitted by paragraph (a)(3) of this section, an employee, including a special Government employee, shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties.

(1) *Relationship to other limitations on receipt of compensation.* The compensation prohibition contained in this section is in addition to any other limitation on receipt of compensation set forth in this chapter, including:

(i) The honorarium prohibition on receipt of compensation for an appearance, speech or article, which is im-

plemented in §§ 2636.201 through 2636.205 of this chapter;

(ii) The requirement contained in § 2636.307 of this chapter that covered noncareer employees obtain advance authorization before engaging in teaching for compensation; and

(iii) The prohibitions and limitations in § 2635.804 and in § 2636.304 of this chapter on receipt of outside earned income applicable to certain Presidential appointees and to other covered noncareer employees.

Example 1. A personnel specialist employed by the Department ~~of Labor has been~~ asked by the publisher of a magazine to write an article on his hobby of collecting arrowheads. Even though the subject matter is unrelated to his official duties, he may not accept the publisher's offer of $200 for the article. Because the compensation offered is for an article, its receipt would violate the honorarium prohibition contained in §§ 2636.201 through 2636.205 of this chapter.

(2) *Definitions.* For purposes of this paragraph:

(i) Teaching, speaking or writing relates to the employee's official duties if:

(A) The activity is undertaken as part of the employee's official duties;

(B) The circumstances indicate that the invitation to engage in the activity was extended to the employee primarily because of his official position rather than his expertise on the particular subject matter;

(C) The invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance or nonperformance of the employee's official duties;

(D) The information conveyed through the activity draws substantially on ideas or official data that are nonpublic information as defined in § 2635.703(b); or

(E) Except as provided in paragraph (a)(2)(i)(E)(*4*) of this section, the subject of the activity deals in significant part with:

(*1*) Any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period;

(*2*) Any ongoing or announced policy, program or operation of the agency; or

(*3*) In the case of a noncareer employee as defined in § 2636.303(a) of this chapter, the general subject matter area, industry, or economic sector primarily affected by the programs and operations of his agency.

(*4*) The restrictions in paragraphs (a)(2)(i)(E) (*2*) and (*3*) of this section do not apply to a special Government employee. The restriction in paragraph (a)(2)(i)(E)(*1*) of this section applies only during the current appointment of a special Government employee; except that if the special Government employee has not served or is not expected to serve for more than 60 days during the first year or any subsequent one year period of that appointment, the restriction applies only to particular matters involving specific parties in which the special Government employee has participated or is participating personally and substantially.

NOTE: Section 2635.807(a)(2)(i)(E) does not preclude an employee, other than a covered noncareer employee, from receiving compensation for teaching, speaking or writing on a subject within the employee's discipline or inherent area of expertise based on his educational background or experience even though the teaching, speaking or writing deals generally with a subject within the agency's areas of responsibility.

Example 1: The Director of the Division of Enforcement at the Commodity Futures Trading Commission has a keen interest in stamp collecting and has spent years developing his own collection as well as studying the field generally. He is asked by an international society of philatelists to give a series of four lectures on how to assess the value of American stamps. Because the subject does not relate to his official duties, the Director may accept compensation for the lecture series. He could not, however, accept a similar invitation from a commodities broker.

Example 2: A scientists at the National Institutes of Health, whose principal area of Government research is the molecular basis of the development of cancer, could not be compensated for writing a book which focuses specifically on the research she conducts in her position at NIH, and thus, relates to her official duties. However, the scientists could receive compensation for writing or editing a textbook on the treatment of all cancers, provided that the book does not focus on recent research at NIH, but rather conveys scientific knowledge gleaned from the scientific community as a whole. The book might include a chapter, among many other chapters, which discusses the molecular basis of cancer development. Additionally, the book could contain brief discussions of recent developments in cancer treatment, even though some of those developments are derived from NIH research, as long as it is available to the public.

Example 3: On his own time, a National Highway Traffic Safety Administration employee prepared a consumer's guide to purchasing a safe automobile that focuses on automobile crash worthiness statistics gathered and made public by NHTSA. He may not receive royalties or any other form of compensation for the guide. The guide deals in significant part with the programs or operations of NHTSA and, therefore, relates to the employee's official duties. On the other hand, the employee

could receive royalties from the sale of a consumer's guide to values in used automobiles even though it contains a brief, incidental discussion of automobile safety standards developed by NHTSA.

Example 4: An employee of the Securities and Exchange Commission may not receive compensation for a book which focuses specifically on the regulation of the securities industry in the United States, since that subject concerns the regulatory programs or operations of the SEC. The employee may, however, write a book about the advantages of investing in various types of securities as long as the book contains only an incidental discussion of any program or operation of the SEC.

Example 5: An employee of the Department of Commerce who works in the Department's employee relations office is an acknowledged expert in the field of Federal employee labor relations, and participates in Department negotiations with employee unions. The employee may receive compensation from a private training institute for a series of lectures which describe the decisions of the Federal Labor Relations Authority concerning unfair labor practices, provided that her lectures do not contain any significant discussion of labor relations cases handled at the Department of Commerce, or the Department's labor relations policies. Federal Labor Relations Authority decisions concerning Federal employee unfair labor practices are not a specific program or operation of the Department of Commerce and thus do not relate to the employee's official duties. However, an employee of the FLRA could not give the same presentations for compensation.

Example 6: A program analyst employed at the Environmental Protection Agency may receive royalties and other compensation for a book about the history of the environmental movement in the United States even though it contains brief references to the creation and responsibilities of the EPA. A covered noncareer em-

ployee of the EPA, however, could not receive compensation for writing the same book because it deals with the general subject matter area affected by EPA programs and operations. Neither employee could receive compensation for writing a book that focuses on specific EPA regulations or otherwise on its programs and operations.

Example 7: An attorney in private practice has been given a one year appointment as a special Government employee to serve on an advisory committee convened for the purpose of surveying and recommending modification of procurement regulations that deter small businesses from competing for Government contracts. Because his service under that appointment is not expected to exceed 60 days, the attorney may accept compensation for an article about the anticompetitive effects of certain regulatory certification requirements even though those regulations are being reviewed by the advisory committee. The regulations which are the focus of the advisory committee deliberations are not a particular matter involving specific parties. Because the information is nonpublic, he could not, however, accept compensation for an article which recounts advisory committee deliberations that took place in a meeting closed to the public in order to discuss proprietary information provided by a small business.

Example 8: A biologist who is an expert in marine life is employed for more than 60 days in a year as a special Government employee by the National Science Foundation to assist in developing a program of grants by the Foundation for the study of coral reefs. The biologist may continue to receive compensation for speaking, teaching and writing about marine life generally and coral reefs specifically. However, during the term of her appointment as a special Government employee, she may not receive compensation for an article about the NSF program she is participating in developing. Only the latter would concern a matter to which the special Government employee is assigned.

Example 9: An expert on international banking transactions has been given a one-year appointment as a special Government employee to assist in analyzing evidence in the Government's fraud prosecution of owners of a failed savings and loan association. It is anticipated that she will serve fewer than 60 days under that appointment. Nevertheless, during her appointment, the expert may not accept compensation for an article about the fraud prosecution, even though the article does not reveal nonpublic information. The prosecution is a particular matter that involves specific parties.

(ii) *Agency* has the meaning set forth in § 2635.102 (a), except that any component of a department designated as a separate agency under § 2635.203(a) shall be considered a separate agency.

(iii) *Compensation* includes any form of consideration, remuneration or income, including royalties, given for or in connection with the employee's teaching, speaking or writing activities. Unless accepted under specific statutory authority, such as 31 U.S.C. 1353, 5 U.S.C. 4111 or 7342, or an agency gift acceptance statute, it includes transportation, lodgings and meals, whether provided in kind, by purchase of a ticket, by payment in advance or by reimbursement after the expense has been incurred. It does not include:

(A) Items offered by any source that could be accepted from a prohibited source under subpart B of this part;

(B) Meals or other incidents of attendance such as waiver of attendance fees or course materials furnished as part of the event at which the teaching or speaking takes place; or

(C) Copies of books or of publications containing articles, reprints of articles, tapes of speeches, and similar items that provide a record of the teaching, speaking or writing activity.

(iv) *Receive* means that there is actual or constructive receipt of the compensation by the employee so that the employee has the right to exercise dominion and control over the compensation and to direct its subsequent use. Compensation received by an employee includes compensation which is:

(A) Paid to another person, including a charitable organization, on the basis of designation, recommendation or other specification by the employee; or

(B) Paid with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative.

(v) *Particular matter involving specific parties* has the meaning set forth in § 2637.102(a)(7) of this chapter.

(vi) *Personal and substantial participation* has the meaning set forth in § 2635.402(b)(4).

(3) *Exception for teaching certain courses.* Notwithstanding that the activity would relate to his official duties under paragraphs (a)(2)(i) (B) or (E) of this section an employee may accept compensation for teaching a course requiring multiple presentations by the employee if the course is offered as part of:

(i) The regularly established curriculum of:

(A) An institution of higher education as defined at 20 U.S.C. 1141(a);

(B) An elementary school as defined at 20 U.S.C. 2891(8); or

(C) A secondary school as defined at 20 U.S.C. 2891(21); or

(ii) A program of education or training sponsored and funded by the Federal Government or by a State or local government which is not offered by an entity described in paragraph (a)(3)(i) of this section.

Example 1: An employee of the Cost Accounting Standards Board who teaches an advanced accounting course as part of the regular business school curriculum of an accredited university may receive compensation for teaching the course even though a substantial portion of the course deals with cost accounting principles applicable to contracts with the Government. Moreover, his receipt of a salary or other compensation for teaching this course does not violate the honorarium prohibition on receipt of compensation for any speech, which is implemented in §§ 2636.201 through 2636.205 of this chapter.

Example 2: An attorney employed by the Equal Employment Opportunity Commission may accept compensation for teaching a course at a state college on the subject of Federal employment discrimination law. The attorney could not accept compensation for teaching the same seminar as part of a continuing education program sponsored by her bar association because the subject of the course is focused on the operations or programs of the EEOC and the sponsor of the course is not an accredited educational institution.

Example 3: An employee of the National Endowment for the Humanities is invited by a private university to teach a course that is a survey of Government policies in support of artists, poets and writers. As part of his official duties, the employee administers a grant that the university has received from the NEH. The employee may not accept compensation for teaching the course because the university has interests that may be substantially affected by the performance or nonperformance of the employee's duties. Likewise, an employee may not receive compensation for any teaching that is undertaken as part of his official duties or that involves the use of nonpublic information.

(b) *Reference to official position.* An employee who is engaged in teaching, speaking or writing as outside

employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity or to promote any book, seminar, course, program or similar undertaking, except that:

(1) An employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking or writing, provided that his title or position is given no more prominence than other significant biographical details;

(2) An employee may use, or permit the use of, his title or position in connection with an article published in a scientific or professional journal, provided that the title or position is accompanied by a reasonably prominent disclaimer satisfactory to the agency stating that the views expressed in the article do not necessarily represent the views of the agency or the United States; and

(3) An employee who is ordinarily addressed using a general term of address, such as "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank in connection with his teaching, speaking or writing.

NOTE: Some agencies may have policies requiring advance agency review, clearance, or approval of certain speeches, books, articles or similar products to determine whether the product contains an appropriate disclaimer, discloses nonpublic information, or otherwise complies with this section.

Example 1: A meteorologist employed with the National Oceanic and Atmospheric Administration is asked by a local university to teach a graduate course on hurricanes. The university may include the meteorologist's Government title and position together with other information about his education and previous employment in course materials setting forth biographical data on all

teachers involved in the graduate program. However, his title or position may not be used to promote the course, for example, by featuring the meteorologist's Government title, Senior Meteorologist, NOAA, in bold type under his name. In contrast, his title may be used in this manner when the meteorologist is authorized by NOAA to speak in his official capacity.

Example 2: A doctor just employed by the Centers for Disease Control has written a paper based on his earlier independent research into cell structures. Incident to the paper's publication in the Journal of the American Medical Association, the doctor may be given credit for the paper, as Dr. M. Wellbeing, Associate Director, Centers for Disease Control, provided that the article also contains a disclaimer, concurred in by the CDC, indicating that the paper is the result of the doctor's independent research and does not represent the findings of the CDC.

Example 3: An employee of the Federal Deposit Insurance Corporation has been asked to give a speech in his private capacity, without compensation, to the annual meeting of a committee of the American Bankers Association on the need for banking reform. The employee may be described in his introduction at the meeting as an employee of the Federal Deposit Insurance Corporation provided that other pertinent biographical details are mentioned as well.

[57 FR 35041, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992]

§ 2635.808 Fundraising activities.

An employee may engage in fundraising only in accordance with the restrictions in part 950 of this title on the conduct of charitable fundraising in the Federal workplace and in accordance with paragraphs (b) and (c) of this section.

(a) *Definitions.* For purposes of this section: (1) *Fundraising* means the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. 527(e), through:

(i) Solicitation of funds or sale of items; or

(ii) Participation in the conduct of an event by an employee where any portion of the cost of attendance or participation may be taken as a charitable tax deduction by a person incurring that cost.

(2) *Participation in the conduct of an event* means active and visible participation in the promotion, production, or presentation of the event and includes serving as honorary chairperson, sitting at a head table during the event, and standing in a reception line. The term does not include mere attendance at an event provided that, to the employee's knowledge, his attendance is not used by the nonprofit organization to promote the event. While the term generally includes any public speaking during the event, it does not include the delivery of an official speech as defined in paragraph (a)(3) of this section or any seating or other participation appropriate to the delivery of such a speech. Waiver of a fee for attendance at an event by a participant in the conduct of that event does not constitute a gift for purposes of subpart B of this part.

NOTE: This section does not prohibit fundraising for political parties. However, there are statutory restrictions that apply to political fundraising. Employees, other than those exempt under 5 U.S.C. 7324(d), are prohibited by the Hatch Act, 5 U.S.C. 7321 through 7328, from soliciting or collecting contributions or other funds for a partisan political purpose or in connection with a partisan election. In addition, all employees are prohibited by 18 U.S.C. 602 from knowingly soliciting contributions for any political purpose from other employees and by 18 U.S.C. 607 from soliciting such contributions in the Federal workplace.

Example 1: The Secretary of Transportation has been asked to serve as master of ceremonies for an All-Star Gala. Tickets to the event cost $150 and are tax deductible as a charitable donation, with proceeds to be donated to a local hospital. By serving as master of ceremonies, the Secretary would be participating in fundraising.

(3) *Official speech* means a speech given by an employee in his official capacity on a subject matter that relates to his official duties, provided that the employee's agency has determined that the event at which the speech is to be given provides an appropriate forum for the dissemination of the information to be presented and provided that the employee does not request donations or other support for the nonprofit organization. Subject matter relates to an employee's official duties if it focuses specifically on the employee's official duties, on the resopnsibilities, programs, or operations of the employee's agency as described in § 2635.807(a)(2)(i)(E), or on matters of Administration policy on which the employee has been authorized to speak.

Example 1: The Secretary of Labor is invited to speak at a banquet honoring a distinguished labor leader, the proceeds of which will benefit a nonprofit organization that assists homeless families. She devotes a major portion of her speech to the Administration's Points of Light initiative, an effort to encourage citizens to volunteer their time to help solve serious social problems. Because she is authorized to speak on Administration policy, her remarks at the banquet are an official speech. However, the Secretary would be engaged in fundraising if she were to conclude her official speech with a request for donations to the nonprofit organization.

Example 2: A charitable organization is sponsoring a two-day tennis tournament at a country club in the Washington, DC area to raise funds for recreational programs for learning disabled children. The organization has in-

vited the Secretary of Education to give a speech on federally funded special education programs at the awards dinner to be held at the conclusion of the tournament and a determination has been made that the dinner is a appropriate forum for the particular speech. The Secretary may speak at the dinner and, under § 2635.204(g)(1), he may partake of the meal provided to him at the dinner.

(4) *Personally solicit* means to request or otherwise encourage donations or other support either through person-to-person contact or through the use of one's name or identity in correspondence or by permitting its use by others. It does not include the solicitation of funds through the media or through either oral remarks, or the contemporaneous dispatch of like items of mass-produced correspondence, if such remarks or correspondence are addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted at subordinates or at persons who are prohibited sources within the meaning of § 2635.203(d). It does not include behind-the-scenes assistance in the solicitation of funds, such as drafting correspondence, stuffing envelopes, or accounting for contributions.

Example 1: An employee of the Department of Energy who signs a letter soliciting funds for a local private school does not "personally solicit" funds when 500 copies of the letter, which makes no mention of his DOE position and title, are mailed to members of the local community, even though some individuals who are employed by Department of Energy contractors may receive the letter.

(b) *Fundraising in an official capacity.* An employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties. When authorized to participate in an official

capacity, an employee may use his official title, position and authority.

Example 1: Because participation in his official capacity is authorized under part 950 of this title, the Secretary of the Army may sign a memorandum to all Army personnel encouraging them to donate to the Combined Federal Campaign.

(c) *Fundraising in a personal capacity.* An employee may engage in fundraising in his personal capacity provided that he does not:

(1) Personally solicit funds or other support from a subordinate or from any person:

(i) Known to the employee, if the employee is other than a special Government employee, to be a prohibited source within the meaning of § 2635.203(d); or

(ii) Known to the employee, if the employee is a special Government employee, to be a prohibited source within the meaning of § 2635.203(d)(4) that is a person whose interests may be substantially affected by performance or nonperformance of his official duties;

(2) Use or permit the use of his official title, position or any authority associated with his public office to further the fundraising effort, except that an employee who is ordinarily addressed using a general term of address, such "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank for such purposes; or

(3) Engage in any action that would otherwise violate this part.

Example 1: A nonprofit organization is sponsoring a golf tournament to raise funds for underprivileged children. The Secretary of the Navy may not enter the tournament with the understanding that the organization intends to attract participants by offering other entrants the opportunity, in exchange for a donation in the form

of an entry fee, to spend the day playing 18 holes of golf in a foursome with the Secretary of the Navy.

Example 2: An employee of the Merit Systems Protection Board may not use the agency's photocopier to reproduce fundraising literature for her son's private school. Such use of the photocopier would violate the standards at § 2635.704 regarding use of Government property.

Example 3: An Assistant Attorney General may not sign a letter soliciting funds for a homeless shelter as "John Doe, Assistant Attorney General." He also may not sign a letter with just his signature, "John Doe," soliciting funds from a prohibited source, unless the letter is one of many identical, mass-produced letters addressed to a large group where the solicitation is not known to him to be targeted at persons who are either prohibited sources or subordinates.

[57 FR 35041, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992]

§ 2635.809 Just financial obligations.

Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law. For purposes of this section, a just financial obligation includes any financial obligation acknowledged by the employee or reduced to judgment by a court. In good faith means an honest intention to fulfill any just financial obligation in a timely manner. In the event of a dispute between an employee and an alleged creditor, this section does not require an agency to determine the validity or amount of the disputed debt or to collect a debt on the alleged creditor's behalf.